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CURRENT TOPICS.

In Cairo, etc. R. Co. v. Stevens, 73 Ind. 278, the complaint alleged that the appellee owned a farm lying between the Wabash River and the appellant's railroad; that the appellant constructed its road upon a solid embankment, without water-ways, for a distance of ten miles; that the overflowing waters of the Wabash River, in times of floods, passing over the appellee's farm, were stopped in their natural flow by the embankment and dammed up on the appellee's land, thereby destroying the crops, etc. The complaint charged the appellant with negligence in failing to provide water-ways for the escape of the water.

The court, on appeal, held the complaint bad on demurrer, for the reason that the appellant could not thus be legally charged with negligence in the construction of its embankment. In stating the general rule of law governing the case, the court say: "With reasonably near approximations to accuracy, it may be laid down as a general rule, that, upon the boundaries of his own land, not interfering with any prescriptive or natural water-course, the owner may erect such barriers as he may deem necessary to keep all surface water or overflowing floods, coming from or across adjacent lands; and for any consequent repulsions, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible."

In Carriger v. East Tennessee, etc. R. Co., recently decided by the Supreme Court of Tennessee, the same point as that in Stevens' Case, *supra*, was before the court, and an opposite conclusion reached. The court held that it is the duty of a railroad company in the construction of its road to provide culverts, or other means, for the safe passage of accumulated surface water, and for injury to adjacent lands by overflow, or back water, through failure or neglect to perform this duty, it will be liable in damages. It must also provide against the unusual and extraordinary accumulations which have once happened, and is conclusively presumed to know the habits of streams adjacent to the line of its track. The right of way to the land upon which the road is constructed, endows it with no rights beyond those expressed. All lands are, of necessity, burdened with the servitude of receiving and discharging the water which flows over to them from lands on a higher level. Possible future injuries from accumulated surface water caused by the erection of the roadbed and track, are not a part of the incidental loss and damage estimated in fixing compensation for the right of way. Each overflow caused by the negligence, carelessness or want of skill of the railroad company, or its agents, is, the court holds, an independent wrong, and a cause of action to the rightful possessor of land overflowed for damages resulting to the crops, or other property, by reason thereof. See also Shane v. Kansas City, etc. R. Co., 71 Mo. 237; s. c., 36 Am. Rep. 480, with note.

The Missouri Bar Association, which was organized by the convention of the bar that assembled at Kansas City on the 29th of last December, for the purpose of consulting as to the best method of affording relief to the crowded condition of the Supreme Court docket, will hold its first annual meeting in Court Room No. 4 of the Circuit Court in this city, on Tuesday, December 27, at ten o'clock A. M. The order of business for the first day will consist of: 1. An annual address of the out-going President; 2. Reports of Secretary and Treasurer; 3. Reports of Executive Committee; 4. Reports of Standing and Special Committees. For the second day: 1. An Address by Wm. G. Hammond, Dean of the St. Louis Law School; 2. A Paper by Jay L. Torrey, Esq.. of the St. Louis Bar, upon the subject of "The Judicial System of Missouri;" 3. A Paper by Judge Thomas M. Cooley, recently read before the National Bar Association at Saratoga on "The Dangers of the Recording Laws" will be read by the Secretary; 4. Other appropriate papers; 5. Miscellaneous business; 6. Nomination of officers; 7. Election of Officers for ensuing year.

We consider the organization of this body

an event of great importance to the Bar and the people of the State. If the abuses which press as an incubus upon the administration of justice and render litigation so abhorrent to the practical business mind are ever to be reformed, the movement in that direction must come primarily from the lawyers. They, and they alone, can understand the necessities and the difficulties of the situation. The business public know only the interminable delays and extravagant expenditure which accompany a resort to the courts, and, knowing them, naturally prefer to endure any loss or imposition rather than litigate. Reform of the procedure is, in our opinion, the crying need of the hour, and we trust the Bar Association will give it due attention. We hope that its deliberations will not end in idle talk, but that before adjournment is reached, they will be able to recommend the adoption of some practical measures of relief.

THE TEST OF CITIZENSHIP OF A CORPORATION WITHIN THE JUDICIARY ARTICLE OF THE CONSTITUTION OF THE UNITED STATES AND THE JUDICIARY ACTS.

When a corporation does not exercise its functions and powers beyond the limits of the State or sovereignty which created it; and when a corporation exercises its functions in another State or sovereignty by sufferance, or under principles of comity between States such corporation is a citizen of the State or sovereignty which created it, for the purpose of determining the jurisdiction of the United States.[1] This proposition has not been controverted. The difficulty lies in determining the citizenship, first, where a corporation is created by the separate enactments of two or more States, having one and the same name and corporate powers, one and the same board of officers, and one place of business in one of the States; second, where existing corporations of different States are authorized by their respective States to consolidate or merge, or to form one and the same company; third, where a corporation, originally created by one State, is authorized by another State to extend its corporation into or through, or do business in the latter State; or to purchase or lease a corporation already existing in the latter State.

The Constitution of the United States provides that the judicial power of the United States shall extend to "controversies between *citizens* of the different States," and that the laws made in pursuance of the Constitution shall be the supreme law of the land. The judiciary acts provide that in any suit of a civil nature at law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in which there is a controversy between the citizens of different States, the United States courts shall have jurisdiction.[2]

At first the courts held that a corporation was not a citizen within the meaning of the Constitution and judiciary acts of the United States; but if the persons who composed the body corporate were all citizens of the State wherein the corporation was created and exercises its corporate powers, the court would then take jurisdiction in a civil suit by or against a corporation, when the adverse party was a citizen of a different State;[3] for the reason that a corporation is not a natural person, capable of exercising the faculties of citizenship, but is an artificial person or legal entity, brought into existence, and acts by virtue of the law which created it and gave it vitality, and can not, therefore, exist or act where that law does not operate and is in force; it exists, is known, and must dwell in the place of its creation, and can have no legal existence outside of the State or sovereignty which creates it.[4] But the citizens

[1] Bank of Augusta v. Earle, 13 Pet. 512; Railroad v. Harris, 12 Wall. 65; Railroad v. Wheeler, 1 Black, 286; Railroad v. Whitton, 13 Wall. 283. A corporation created by one State may exercise its faculties and powers in another State, but subject to such lawful conditions as such other State may prescribe. Insurance Co. v. French, 18 How. 405; Insurance Co. v. Francis, 11 Wall. 415; Blackstone Co. v. Inhabitants, 13 Gray, 489. And if such corporation do business in a foreign State, it is an implied consent to any lawful condition prescribed by the *lex loci*. Insurance Co. v. French, *supra*.

[2] Act 1789, 1 Stat. 79, ch. 20, sec. 12; Act 1866, 14 Stat. 306, ch. 288; Act 1867, 14 Stat. 558 ch. 196; Act 1875, 18 Stat. 270, ch. 137.

[3] Insurance Co. v. Boardman, 5 Cranch, 57; U. S. Bank v. Devaux, 5 Cranch, 61; United States v. Planters' Bank, 9 Wheat. 410. See Commercial Bank v. Slocum, 14 Pet. 60.

[4] Bank of Augusta v. Earle, 13 Pet. 512; Marshall v.

who compose the corporation must be recognized, and therefore, for the purposes of jurisdiction, any suit of a civil nature by or against a corporation would be held to be the suit of the individuals who composed the corporation, and not the suit of the corporation itself. [5]

Subsequently the question was presented that, under the rule thus established, the Federal courts had no jurisdiction, when some of the individuals who composed the corporation were not citizens of the State which created the corporation; but it was decided that, for the purposes of jurisdiction, the court would not look to the actual residence of the persons who composed the corporation, but would presume that such persons were citizens of the State which created the corporation, and that no averment or evidence would be admitted to contradict this.[6] This ruling was equivalent to deciding that a corporation is a citizen of the State which created it, within the meaning of the judiciary article of the Constitution and the judiciary acts; and in a subsequent case, the court held that for the purposes of Federal jurisdiction, a corporation will be regarded as a citizen of the State which created it. [7] This exploded the rulings in the first cases, and has not been controverted since. At this period it was settled that a corporation had no existence outside of the State which created it, and that for the purposes of Federal jurisdiction, such corporation was a citizen of such State. [8]

Then the question arose, when a corporation is created or incorporated by two or more States, where is the *habitat* or citizenship of the corporation for the purposes of Federal jurisdiction? [9] and the Supreme Court held that two or more States may unite in creating or incorporating the same corporation; or in combining several pre-existing corporations into one; [10] but a corporation chartered by two or more States is not one and the same legal being in both States, because it has no legal existence in either State but by the law of that State, and that law has no force or effect beyond the borders of its own sovereignty; the corporation may represent under the corporate name the same natural persons, but the legal person, or entity, or person known to the law as a corporation, which is created and exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and powers,[11] and therefore such corporation is a distinct and independent corporation in each State. This doctrine has since been followed.[12] The first proposition is therefore established that a corporation created by the separate enactments of two or more States is a citizen of each State. It was also determined that where existing corporations of different States were authorized by their respective States to consolidate and form one and the same company, such corporation is a citizen of each State,[13] and that a corporation created by one State may exercise its faculties and powers in another State [14] by permission, or sufferance, or by purchase or lease of an existing corporation. Here, then, are two positions: First, a corporation can be a corporation of two or more States, and, as to citizenship, will be a citizen of each State, because it is a separate and independent corporation in each State. Second, a corporation can exercise its faculties in a State wherein it is not incorporated, and in such case it is only the citizen of the State where it is incorporated. But the trouble is to determine when a legislative enactment is a charter or an act of incorporation, and when it is a license, because, if chartered, it is a citizen of the State, or States, where incorporated; if not chartered, it exercises its faculties by virtue of a license, expressed or implied—ex-

Railroad, 16 How. 314; Insurance Co. v. French, 18 How. 407; Railroad v. Wheeler, 1 Black, 295; Paul v. Virginia, 8 Wall. 168.

[5] See cases in note 3.

[6] L., C. & C. R.R. v. Letson, 2 How. 497.

[7] Marshall v. Railroad, 16 How. 329. See Railroad v. Harris, 12 Wall. 82.

[8] Bank of Augusta v. Earle, 13 Pet. 588; Railroad v. Harris, 12 Wall. 82; Railroad v. Wheeler, 1 Black, 286; Railroad v. Whitton, 13 Wall. 270.

[9] See Railroad v. Maryland, 10 How. 392; O. & M. R. R. v. Wheeler, 1 Black, 297.

[10] Railroad v. Maryland. 10 How, 392; O. & M. R. Co. v. Wheeler, 1 Black, 286. See Sprague v. Railroad, 5 R. I. 233; Maryland v. Railroad, 18 Md. 193; Goshorn v. Supervisors, 1 W. Va. 308.

[11] O. & M. R. Co. v. Wheeler, 1 Black, 286. See Railroad v. Letson, *supra*.

[12] Insurance Co. v. Francis, 11 Wall. 415; Railroad v. Harris, 12 Wall. 65; Railroad v. Whitton, 13 Wall. 270.

[13] Insurance Co. v. French, 18 How, 404; Maryland v. N. C. R. Co., 18 Md. 193; Sprague v. Railroad, 5 R. I. 233; County v. Railroad, 51 Pa. St, 228.

[14] Bank v. Earle, 13 Pet. 588; Insurance Co. v. French, 18 How. 405; Insurance Co. v. Francis, 11 Wall. 415; Railroad v. Harris, 12 Wall. 82.

pressed, when in the form of an enactment; implied, when no enactment.[15] It is true that no form of words is necessary in a legislative enactment to create a corporation, but that any language clearly manifesting the legislative intent is sufficient.[16]

In Baltimore, etc. R. Co. v. Harris,[17] the court held that a legislative enactment of one State, "confirming" an act of incorporation of another State, and granting the same rights and privileges, and subjecting it to the same pains and penalties and obligations as imposed by the original act, and reserving the same rights, privileges and immunities as is reserved in the original act, *did not* create a new corporation, but granted a license, and nothing more; its unity and ownership were unchanged, and, therefore, such corporation was amenable in the District of Columbia for an injury committed in Virginia; it being the same corporation in name, locality, officers, powers, and business in both places, and not a separate and distinct corporation.[18] In this case the facts were that the company had been chartered by Maryland to build and operate a road from Baltimore to the Ohio River, and from Baltimore to the District of Columbia. Subsequently Virginia granted to that corporation the same rights in that State as it had in Maryland. Congress authorized the company to extend its branch into the District of Columbia. The question involved was, whether the corporation could be sued in the courts of the District of Columbia for injuries received by a passenger on the road in the State of Virginia. The writ was served on the president of the company whilst in the District of Columbia. The headquarters of the company were in Baltimore. The jurisdiction of the district court was, by act of Congress, limited to "inhabitants of the district, or persons found within the same." The company claimed that it was not an inhabitant of the district, because it was a Maryland corporation; and, under the authorities, a corporation must dwell in—and has no existence outside of—the State which created it, and, therefore, the authority by which the corporation did business in the District of Columbia was a mere license, or enabling act, and not a charter; it could not be sued in the District of Columbia; besides, it was claimed that the corporation which did the injury was a Virginia corporation, and the corporation sued, was a Maryland corporation. But the court held that the authority by which the corporation exercised its faculties in Virginia and the District of Columbia were enabling acts—a mere license—to the Maryland corporation, and, therefore, as the company sued and the company which did the injury, is one and the same company, licensed to exercise its faculties in Virginia and the District of Columbia, and made by such license liable to suit, it is an inhabitant of the district in all respects as if it were an independent corporation. The question depends on this decision, which has been cited as authority for and against the principles in it.[19] That case decided that the acts of Virginia and Congress did not create a new corporation, but granted a permission, or license, to the Maryland corporation; but it also decided that such corporation was subject to suit in the sovereignty which granted that permission, or license, when the corporation exercised its faculties under that permission, if the grant provided for such suit.[20] The court in this case approved the doctrine that a corporation had no existence outside of the State which created it,[21] except by permission, or license, of the other State;[22] "so far, and on such terms, and to such extent as may be permitted by the latter," such as that the corporation shall be subject to suit, because the question is one of legislative intent, and not whether the legislature can prescribe such terms. It approved the doctrine that a corporation was a citizen of the State which created it;[23] that one State may make a corporation of another State a corporation of its

15 See Ins. Co. v. French, 18 How. 405.

16 2 Kent Com. 276; Angel & Ames on Corp.; Dillon on Corp.

17 12 Wall. 82.

18 This view was reiterated in Railroad v. Whitton, 13 Wall. 270, stating that such statute did not alter the citizenship, but only enlarged the sphere of its operations.

19 See B. & O. R. Co. v. Cary, 28 Ohio St. 214; Campbell v. Railroad, 23 Ohio St. 168; Ohio, *ex rel.* v. Sherman, 22 Ohio St. 411; P. A. Co. v. Pierce, 27 Ohio St. 155.

20 On page 84. This was approved in Railroad v. Whitton, 13 Wall. 270.

21 Approving Bank of Augusta v. Earle, 13 Pet. 588.

22 Citing Bank v. Earle, *supra*, and Blackstone Co. v. Inhabitants, 13 Gray, 480; Insurance Co. v. French, 18 How. 405.

23 Citing Railroad v. Letson, 2 How. 497; Marshall v. Railroad, 16 How. 329.

own,[24] or unite with other States in creating the same corporation, or in combining several pre-existing corporations into one.[25] The decision is that the enactment under which the company existed in Virginia and the District of Columbia was a license, and as that license provided that such company could be sued, it was therefore liable to suit within the territory which granted the license. Prior to, and contemporaneous with, this decision, the State courts held that the legislative enactment which the Harris case decided to be a license, was a charter, and that it created a separate and distinct corporation, because such an act "in effect re-enacted the original law, thereby erecting the company into a domestic corporatiou; and because subsequent laws showed that such was the legislative intent."[26]

If chartered, it is a citizen of the State which chartered it. If operating under a license, or permission, it is a citizen of the State which incorporated it, and not a citizen of the State which grants a license;[27] because a license is not a charter, but a permit. But it has been decided,[28] that a corporation exercising its faculties under a license, can, if the license so provides, be sued as if it were an independent corporation in the State which granted the license.[29] If this is correct, it follows that a corporation working under a license is, for the purposes of jurisdiction, a domestic corporation. If suable as a domestic corporation, it is not suable as a foreign corporation; and it therefore follows that such a corporation is a domestic corporation *quoad hoc*, the property, faculties and business within the State granting the license.[30] This has been the ruling in several State courts.[31] This is either the correct conclusion, or it is not. If it is true, as the Harris case seems to decide, that a corporation operating under a license is suable as if it were a domestic corporation, the conclusion is correct. If, on the other hand, this case does not decide this, then this conclusion is not correct; but should be that a corporation exercising its faculties under a license or permit, is a foreign corporation, and for the purposes of Federal jurisdiction it is not a citizen of the State which grants the license. But the Harris Case did decide as first above stated, which was subsequently approved,[32] and in it the court approved and cited prior decisions which tended in this direction. To this conclusion the objection might be raised, that it prohibits the removal of causes to Federal jurisdiction from a State court, which would conflict with later decisions;[33] but the answer to this is, that when the legislature expressly recognizes a foreign corporation, it can not impose upon it an unlawful condition.

If what has been stated is correct, the conclusion follows, that where a corporation, originally created by one State, is authorized by another State to purchase or lease a corporation already existing in the latter State, it thereby becomes a corporation of such latter State, and a citizen thereof, within the meaning of the judiciary acts. Its powers and franchises are measured by the laws of the latter State, and not by the laws of the State where originally created;[34] because whatever powers it can exercise by virtue of the purchase or lease, are those which were possessed by the corporation which it leased or bought, and none other. The vendee or lessee derives all its powers from the charter or legislative privileges conferred on the vendor or lessor.

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[24] Citing Railroad v. Wheeler, 1 Black, 297.

[25] Citing Railroad v. Maryland, 10 How. 392.

[26] B. & O. R. Co. v. Gallahue, 12 Gratt. 655; Goshorn v. Supervisors, 1 W. Va. 308; B. & O. R. Co. v. Supervisors, 3 W. Va. 319; Hart v. B. & O. R. Co., 6 W. Va. 336. See P. W. & K. R. Co. v. B. & O. R. Co., 17 W. Va. ——.

[27] As decided in Day v. India Rubber Co., 1 Blatch. 628; Lafette v. French, 18 How. 404.

[28] Railroad v. Harris, 12 Wall. 82; Railroad v. Whitton, 13 Wall. 270.

[29] The language used in the last paragraph in the Harris Case, 12 Wall. 82.

[30] See, Muller v. Dows, 4 Otto, 444; *Ex parte* Shallenberger, 6 Otto, 369; Insurance Co. v. French, 18 How. 404.

[31] Insurance Co. v. Kasey, 28 Gratt. 268; Railroad v. Wightman, 29 Gratt. 431; Railroad v. Noell, 32 Gratt. 394; Cowardin v. Ins. Co., 32 Gratt. 445.

[32] Railroad v. Whitton, 13 Wall. 270.

[33] Morse v. Insurance Co., 20 Wall. 445; Doyle v. Insurance Co., 4 Otto, 535; Insurance Co. v. Dunn, 19 Wall. 214. See, Railway v. Stringer, 32 Ohio St. 468; Ohio *ex rel.* v. Sherman, 22 Ohio St. 411; Assurance Co. v. Pierce, 27 Ohio St. 155; Railroad v. Cary, 28 Ohio St. 216, where the dissenting opinion appears to be the best.

[34] Insurance Co. v. French, 18 How. 404; Campbell v. Railroad, 23 Ohio St. 168; Railroad v. Sly, 65 Pa. St. 205; Wightman v. Railroad Co., 29 Gratt. 437; Railway v. Noell, 32 Gratt. 394; Cowardin v. Ins. Co., 32 Gratt. 445. Athough Baltimore, etc. R. Co. v. Cary, 28 Ohio St. 208, appears to be against this.

THE EFFECT OF COVERTURE UPON TORTS AND CRIMES COMMITTED BY THE WIFE.

The object of this article is to consider the legal effects and consequences of *coverture* upon the crimes and torts of the wife, and the criminal and civil responsibility therefor. The cardinal doctrine of the common law upon the subject of *coverture* is the merger of the legal existence of the wife in that of the husband. From this, as a natural consequence, flow most of the principles with which we have to deal here. In addition to the civil responsibility of the husband for the wife's torts, which will be considered hereafter, and which is the most obvious result of the doctrine, the wife is further protected from criminal liability for offenses of inferior degree, which are committed in his presence and under his direction, by a presumption which the law raises, that her actions were coerced by him.[1] It would seem that in determining whether or not this principle can be invoked in a particular case, the law looks rather to the relation existing between the parties than to any actual coercion on the part of the husband. The possibility, rather than the fact, of coercion has been considered sufficient to give rise to the needed presumption. Thus it was held that it was not neceesary that the husband should be actually present at the time of the commission of the crime, provided he was near enough at hand for her to be under his influence and control.[2] But a direction, by a husband who is confined in jail upon a charge of unlawfully selling spirituous liquors, to his wife to continue the illicit traffic, will not raise the presumption in her favor in a prosecution for the same offense.[3] And under an indictment charging a husband and wife jointly with having certain burglarious implements and tools in their possession, with felonious intent to use them, it was held that the possession of the wife, while her husband was with her, was *prima facie* innocent, as under coercion of the husband; but for possession by her in the absense of her husband, though by his direction, she would be responsible.[4] Not only is this the rule, but it has been held further that the mere presence of the husband, at the time of the commission of the offense by the wife, is sufficient to raise the presumption of coercion, though he may have taken no part whatever in the transaction.[5] In New York, however, it has been held that the circumstances of the presence of the husband and by his direction must be concurrent. "An offense by his direction, but not in his presence, does not exempt her from liability; nor does his presence, if unaccompanied by his direction. His presence furnishes evidence, and affords a presumption of his direction; but it is not conclusive, and the truth may be established by competent evidence."[6]

This presumption of the coercion of the wife's inclinations is based upon the theory, which is sometimes entirely contrary to the fact, that she is subject to the influence and control of her husband, and the presumption of coercion becomes a violent one. Where this is the case, the facts may always be shown; in other words, the presumption may be rebutted and evidence introduced to show that she was not *sub potestate viri*, that the crime in question proceeded from her own volition.[7] Thus, in a prosecution of the wife for the violation of an ordinance forbidding the sale of liquor to negroes after certain hours, she was convicted, notwithstanding her husband was present and himself actually

[1] 1 Hale's P. C. 152; 4 Black. Com., 29*m*; 2 Kent's Com. 149; Commonwealth v. Neal, 10 Mass. 152; 6 Am. Dec. 105, and note; McKeown v. Johnson, 1 McCord, 578; Marshall v. Oakes, 51 Me. 308; Hensley v. State, 52 Ala. 10; Commonwealth v. Burk, 11 Gray, 437; Commonwealth v. Feeney, 13 Allen, 560; Commonwealth v. Wood, 97 Mass. 225; Uhl v. Commonwealth, 6 Gratt. 706.

[2] Commonwealth v. Burk, 11 Gray, 437; Commonwealth v. Munsey, 112 Mass. 287; Commonwealth v. Welch, 97 Mass. 593.

[3] Commonwealth v. Feeney, 13 Allen, 560. See also State v. Haines, 35 N. H. 207; Rex v. Morris, Russ. & Ry. 270.

[4] State v. Potter, 42 Vt. 495.

[5] Commonwealth v. Eagan, 103 Mass. 71; State v. Williams, 65 N.C. 398; Uhl v. Commonwealth, 6 Gratt. 706; State v. Cleaves, 59 Me. 298. In Arkansas a different rule prevails by force of statute. Freel v. State, 21 Ark. 212.

[6] HUNT, C. J., in Cassin v. Delaney, 38 N. Y. 178. See also Seiler v. People, 77 N. Y. 411.

[7] Brazil v. Moran, 8 Minn. 236; Marshall v. Oakes, 51 Me. 308; Wagener v. Bill, 19 Barb. 321; Seiler v. People, 77 N. Y. 411; Ferguson v. Brooks, 67 Me. 251; State v. Williams, 65 N. C. 398; Uhl v. Commonwealth, 6 Gratt. 706; State v. Cleaves, 59 Me. 298. And to show this state of affairs, it has been held that the husband himself is a competent witness. Cassin v. Delaney, 38 N. Y. 236.

served out the liquor, when it appeared that she was a female sole-trader and kept a retail liquor shop.[8] And where the wife, participating with the husband in a robbery, throttled the victim and told him to keep still, while her husband and a confederate rifled his pockets, it was held that the jury were justified in finding that she did not act under her husband's coercion, but was independently guilty.[9]

In stating the rule above, we have said that this presumption will arise in the wife's favor only in the case of offenses of inferior degree. Just what crimes are to be included in this class, it is difficult to say. The line dividing it from more heinous offenses, which, by virtue of their very atrocity, presuppose independence of purpose, and therefore preclude the presumption, is shadowy in the extreme. In many, and especially the older, authorities, it has been made coincident with the distinction between *mala prohibita* and *mala in se*.[10] This classification, however, has sometimes been rejected, notably in State v. Williams,[11] where the Supreme Court of North Carolina say of this presumption: "It is generally agreed that treason and murder are exceptions to this rule; and some add to these manslaughter, robbery and perjury, although the last is not a felony."[12] In addition to those more heinous offenses, there are some among the lesser crimes which must be classed as exceptions to the rule. Of these are offenses which are peculiar to the female sex, such as keeping bawdy houses and the like.[13]

The presumption arising in the wife's favor as to crimes committed in her husband's presence, or under his influence, is based upon his presumed control of her person. In this respect it differs from his civil liability for her torts, which has its foundation in the control which the common law gave him of her estate. Consequently, we find this distinction recognized in the effect given to the legislation known as the Married Woman's Acts. These are held to have no influence upon the presumption of coercion,[14] though, in many instances, as will be seen hereafter, the husband's civil liability has been seriously modified by them. Yet in Maryland it was considered that the gradual amelioration of the condition of the wife, as to her property rights, had so far altered this rule as to render it actionable now to charge a woman with the commission of a crime in company with her husband, which was not the case at common law, because such accusation imputed to her no criminal liability.[15]

In Arkansas the common law rule as to the presumption of coercion has been somewhat changed by a statute, which declares that "married women acting under the threats, commands or coercion of their husbands, shall not be found guilty of any crime or misdemeanor, if it appears from all the facts and circumstances of the case that violence, threats, commands or coercion were used.[16]

The husband is liable in a civil action for the torts of his wife committed after marriage, and, to a certain extent, for those committed before marriage.[17] He is equally liable, whether the tort is committed in his presence (and therefore presumably by his coercion), or separately and of her own accord, and without his instigation.[18] The distinction is, that where the tort is committed by her in his presence, and the presumption of coercion arises, her act is regarded as his, and that he alone is liable, and consequently the action must be brought against him alone.[19]

[8] City v. Van Roven, 2 McCord, 465.

[9] People v. Wright, 38 Mich. 744.

[10] 1 Hawk. P. C., ch. 1, sec. 13; 1 Blk. 444; 1 Russ. on Crimes, 16; Archbold Crim. Prac. and Pl'dg. 6; Commonwealth v. Neal, 10 Mass. 152; Hensley v. State, 52 Ala. 10.

[11] 65 N. C. 398; and see Davis v. State. 15 Ohio, 72.

[12] For an able discussion on this topic, which is too long to be inserted here, see note to the 9th Am. Ed. Russ. on Crimes, * p. 34.

[13] Bish. Crim. Law, sec. 361; Rex v. Dixon, 10 Mod. 335; Reg. v. Williams, 10 Mod. 63; State v. Bentz, 11 Mo. 27; 4 Bl. Com. 29; 1 Russ. on Crimes, 33, *et seq.*

[14] Commonwealth v. Wood, 97 Mass. 225; Commonwealth v. Gannon, 97 Mass. 547.

[15] Nolan v. Traber, 49 Md. 460; 33 Am. Rep. 277.

[16] Ark. Dig., part I., ch. 51, sec. 1; Freel v. State, 21 Ark. 212; Edwards v. State, 27 Ark. 493.

[17] Reeves on Dom. Rel., 148; Whitmore v. Delano, 6 N. H. 543; Knowing v. Manly, 49 N. Y. 192; Hawks v. Hamar, 5 Binney, 43; Marshall v. Oakes, 51 Me. 308.

[18] McKeown v. Johnson, 1 McCord, 578; Dailey v. Houston, 58 Me. 361; Marshall v. Oakes, 51 Me. 308; Brazil v. Moran, 8 Minn. 236; Park v. Hopkins, 2 Bailey, 411; Curd v. Dodds, 6 Bush, 681; Anderson v. Hill, 53 Barb. 238: Whitmon v. Delano, 6 N. H. 543; Ball v. Bennett, 21 Ind. 427; Hildreth v. Camp, 41 N. J. L. 306.

[19] McKeown v. Johnson, 1 McCord, 578; Dailey v. Houston, 58 Mo. 361; Marshall v. Oakes, 51 Me. 308; Ball v. Bennett, 21 Ind. 427.

Such is the rule, too, with reference to a tort committed by both of them jointly;[20] for the reason it would seem that, in contemplation of law, a tort can not be committed jointly by husband and wife. Whatever she does when in his presence, or under his control, is his act, and not hers.[21] But where the tort is committed under such circumstances as preclude the presumption of coercion, or when such presumption is repelled by the evidence in the case, both are liable, and the wife must be joined with her husband in the action.[22] This doctrine is rendered of more practical importance by the enlargement of the liability of the married woman for her torts, which has been held to follow the increase of her property rights under recent legislation.[23]

Whether or not the legislation, commonly known as the Married Woman's Acts, has operated any alteration of the husband's common-law liability for the torts of his wife, is a question concerning which the courts differ. In quite a respectable number of cases, it is held that it does not.[24] And in Coolidge v. Parris,[25] an action against the husband and wife jointly for assault and battery committed by her, it was held that she can not control the management of the defense, or of a compromise of the action against the wishes of her husband; and if he confess judgment for himself and wife, the court will not interfere at her instance on the ground that she did not consent to the compromise, notwithstanding a provision of the Code which declares that if the husband and wife be sued together, the wife may defend for her own right; and if the husband neglect to defend, for his right also. Such a provision is applicable to an action of tort. In Illinois, however, in the case of Martin v. Robson,[26] it was held by a divided court that statutes giving to the wife, during coverture, the sole control of her separate estate and property acquired in good faith from any person other than husband, and her own earnings for labor performed for any person other than her husband or minor children, with a right to use and possess the property and earnings free from control and independent of her husband, had the effect of wiping out his liability for torts committed by her separately, and in which he in no manner participated. Say the court, in a funereal strain: "So long as the husband was entitled to the property of the wife and to her industry; so long as he had power to direct and control her, and thus prevent her from the commission of torts, there was some reason for his liability. The reason has ceased. The ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. The foundations, hitherto deemed essential for the preservation of the nuptial contract and the maintenance of the marriage relation, are crumbling. The unity of the husband and wife has been severed. They are now distinct persons and may have separaty legal estates, contracts, debts and injuries." In New York a more rational view seems to prevail. There a distinction is made between the husband's control of his wife's person and of her property. In an action against a married woman for fraud in a contract for the sale of her real estate, made by her husband as her agent, it was held not to be necessary to join the husband; that it was a matter having relation to her sole and separate property, and that under the provisions of the statute of 1860, as amended in 1862,[27] she may sue and be sued as a *feme sole;* that these statutes did not alter the common-law liability of the husband for the personal torts of his wife; but when such torts are committed in the management and control of her separate property, the rule is changed and she only is liable.[28] Nor as to torts of this nature committed in his presence is there any presumption that she is under his coercion.[29] A similar ruling prevails in Maine.[30]

[20] Sisco v. Cheeney, Wright, (Ohio) 9; 2 Com. Dig. 111.

[21] Brazil v. Moran, 8 Minn. 236; State v. Potter, 42 Vt. 495; Park v. Hopkins, 2 Bailey, 411; Ball v. Bennett, 21 Ind. 427.

[22] Ferguson v. Brooks, 67 Me. 251; McKeown v. Johnson, 1 McCord, 578; Dailey v. Houston, 58 Mo. 361; Curd v. Dodds, 6 Bush. 681; 2 Kent Com. 150; Anderson v. Hill, 53 Barb. 238; Whitmore v. Delano, 6 N. H. 543; Knowing v. Manly, 49 N. Y. 192; Marshall v. Oakes, 51 Me. 308; Summan v. Brewin, 52 Ind. 140; Wagener v. Bill, 19 Barb. 321.

[23] Ferguson v. Brooks, 67 Me. 259.

[24] McElfresh v. Kirkendall, 36 Iowa, 224; Luse v. Oaks, 36 Iowa, 562; Fowler v. Chichester, 26 Ohio St. 9; Tait v. Culbertson, 57 Barb. 9.

[25] 8 Ohio St. 594.

[26] 65 Ill. 129.

[27] Laws of 1862, ch. 172.

[28] Baum v. Mullen, 47 N. Y. 577. See, also, Gillies v. Lent, 2 Abbott, N. S. 455; Rowe v. Smith, 45 N. Y. 230; Lansing v. Holdridge, 58 How. Pr. 449.

[29] Peak v. Lemon, 1 Lans. 295.

[30] Ferguson v. Brooks, 67 Me. 251.

In two of the States at least (Massachusetts and Michigan) the injustice of permitting the husband's common-law liability for his wife's torts to continue to exist after his marital rights in her property have been so modified, has been recognized by statutory enactment, declaring that the wife alone shall be liable for her own torts.[31]

The consideration of the subject of the husband's and the wife's remedy for a tort committed upon the wife is reserved for a future article.

WM. L. MURFREE, JR.

St. Louis, Mo.

[31] Mass. St. 1871, ch. 312; Hill v. Duncan, 110 Mass. 238; Austin v. Cox, 118 Mass. 58; Mich. Comp. Laws, secs. 6129, 7382; Burt v. McBain, 29 Mich. 260; Ricci v. Miller, 41 Mich. 214.

LIFE INSURANCE — FORFEITURE — NON-PAYMENT OF PREMIUMS.

KLEIN v. NEW YORK LIFE INS. CO.

Supreme Court of the United States, October Term, 1881.

The punctual payment of premiums upon a life policy is of the essence of the contract, and where the insurer has done nothing, implying a waiver of its rights, a court of equity can not relieve the insured from the forfeiture, which, by the terms of the contract, is consequent upon a failure to pay the premiums promptly, because of the peculiar circumstances of the individual case.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice WOODS delivered the opinion of the court:

On September 1, 1866, a policy of insurance was issued by the New York Life Insurance Company, the appellee, upon the life of Frederick W. Klein, in the sum of $5,000, payable to the appellant, Caroline Klein, wife of the said Frederick W., within sixty days after his death and due notice and proof thereof. The policy was in the usual form. The consideration for its issue was the payment to the insurance company by Caroline Klein of an annual premium of one hundred and seventy-three dollars, in semi-annual installments of eighty-six dollars and fifty cents each, on the first day of September and the first day of March of every year during the life of Frederick W. Klein. The policy contained the following provision: "And it is also understood and agreed by the within assured, to be the true intent and meaning hereof that * * * * in case the said Caroline Klein shall not pay the said premiums on or before the several days herein mentioned for the payment thereof, with any interest that may be due thereon, then, and in every such case the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine."

The premiums were punctually paid until March, 1871, when default was made in the payment of the semi-annual installment which matured on the first day of that month, and it remained unpaid until the death of Frederick W. Klein, which occurred March 18, 1871. The agent of the insurance company, after proof of the death of Klein, offered to pay Caroline Klein the surrender value of the policy. She declined to accept this or any sum less than the amount of the insurance. The company then insisted upon the absolute forfeiture of the policy, according to its terms.

Thereupon the appellant filed the bill in this case. It is alleged as the ground of relief that the policy was taken out by Frederick W. Klein without the knowledge of his wife, and that she had received no information of its terms or conditions until after the death of her husband; that he was taken down by the illness of which he died about February 1; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever, and for that reason, and that alone, failed to pay the premium when it was due, and that the appellant failed to pay it because she was ignorant of the existence of the policy and of its terms. The prayer of the bill was as follows: "That the said New York Life Insurance Company may be prevented from insisting upon and taking advantage of the alleged forfeiture of said policy of insurance, and that your oratrix may be relieved from said alleged default upon her part, and the accidental default of the said Frederick W. Klein in the non-payment of the said semi-annual premium maturing March 1, 1871, and that the said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of five thousand dollars," etc.

The answer of the company denied its liability upon the policy of insurance, and insisted that the contract of insurance had ceased and determined by reason of the non-payment of the premium due March 1, 1871, and denied the equity of the bill. Upon final hearing in the circuit court the bill was dismissed, and the cause has been brought to this court for review, by the appeal of the complainant.

Conceding, for the sake of argument, that the case made by the bill is sustained by the evidence, the question is presented whether, upon the facts, the appellant was entitled to the relief prayed for. In the case of New York Life Insurance Company against Statham, 93 U. S. 24, it was held by this court, Mr. Justice Bradley delivering its opinion, that a life insurance policy "is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the

annual premium, but that it is an entire contract for assurance for life, subject to discontinuance and forfeiture for non-payment of the stipulated premiums." But, in the same case, the court further said: "In policies of life insurance time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture, if such be the terms of the contract." While conceding this to be the rule which would apply if an action at law were brought upon the policy, the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case. We can not accede to the view of the appellant. Where a penalty of forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. Sloman v. Walter, 1 Bro. Ch. 419; Sanders v. Pope, 12 Ves. 282; Davis v. West, 12 Ves. 475; Skinner v. Dayton, 2 Johns. Ch. 535. But in every such case the test by which to ascertain whether relief can or can not be had in equity, is to consider whether compensation can or can not be made. In Rose v. Rose, Amb. 332, Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever, against non-payment of money at a day certain, against forfeitures of copyholds; but they are all cases where the court can do it with safety to the other party; for if the court can not put him in as good condition as if the agreement had been performed, the court will not relieve." A life insurance policy usually stipulates, first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit. Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality among its patrons. It was said in New York Life Ins. Co. v. Stratham, *supra*, that "promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payment. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency can not be tolerated or redeemed except at the option of the company." If the insured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the insured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity can not do. Wheeler v. Connecticut Mut. Ins. Co., 82 N. Y. 543; see, also, the opinion of Judge Gholson in Robert v. New England Life Ins. Co., 1 Dis. 355. It might as well undertake to release the insured from the payment of premiums altogether, as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

In a contract of life insurance the insurer and insured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium. The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. The assured also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due. The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it, as the insured has from loss consequent on the risks assumed by him. Neither has any such right. The bill is, therefore, based on a misconception of the powers of a court of equity in such cases.

There is another answer to the case made by the bill. The engagement of the insurance company was with Caroline Klein, and not with Frederick W. Klein. It entered into no contract with the latter. It agreed to pay Caroline Klein the insurance, provided she paid with punctuality the premiums. She was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance upon his life and the terms of the policy. The bill is, therefore, an effort by the appellant to obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent.

We are of opinion that the decree of the circuit court is right and should be affirmed.

DEED — FEOFFMENT IN FUTURO — REMAINDER—WASTE.

ABBOTT v. HOLWAY.

Supreme Court of Maine, June, 1881.

1. Where a deed contains a provision that it is not to take effect and operate as a conveyance until the grantor's decease, and not then if the grantee does not survive him; but if the grantee do survive, it is to convey the premises in fee simple, with words appropriate and consistent with this provision in the *habendum* and covenants, it will be upheld as creating a feoffment to commence *in futuro*, and will give the estate in fee simple to the grantee on the happening of the contingency named, the execution and record of the deed operating in the same manner as a livery of seizin at the grantor's decease.

2. Such a deed is something more than a devise in a will; it conveys to the grantee a contingent right which, unlike the interest of a devisee in the lifetime of the testator, can not be taken from him.

3. Such a deed negatives the idea of an estate in remainder for the benefit of the grantee and the reservation of a life estate to the grantor, and the grantee takes no such interest in the premises during the lifetime of the grantor as will enable him to maintain an action on the case in the nature of waste against the administrator of the grantor for acts done by him in his lifetime after making the deed.

This is an action on the case for waste. The writ is dated September 28, 1878.

The plea is the general issue and brief statement denying the plaintiff's title and claim.

At the trial it was admitted that James Abbott was, on the 30th of April, 1872, and long had been, the husband of the plaintiff; that he died May 5th, 1875; that the defendant is the administrator on his estate; that he owned, on the 30th of April, 1872, and long had owned, the premises described in the writ, a valuable farm in Pittston, upon which was a large timber and wood lot; that he continued to live on the farm with his wife, managing and taking the crops thereof until his death, she now surviving him; that in the winter and spring of 1875, without the consent and against the remonstrance of the plaintiff, he caused to be cut and hauled to market, a quantity of mill logs, cut for that purpose, and not for fencing or repairs. Since Abbott's death, his administrator has sold the lumber made from the logs and received the money therefor. The plaintiff put in evidence the deed from James Abbott to her, dated April 30th, 1872, embracing the premises described in the writ and upon which the alleged waste was committed, and proved its execution and delivery on the day of its date, and its record in the Kennebec registry on the same day by plaintiff's procurement. It is made part of the case: "Know all men by these presents, that I, James Abbott, of Gardiner, in the County of Kennebec, in consideration of one dollar paid by my wife, Clarissa B. Abbott, and for the purpose of providing and securing to my said wife a comfortable support in the event of my decease during her life, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Clarissa B. Abbott, of said Pittston, her heirs and assigns forever, a certain lot of land situate in said Pittston, and bounded * * * * This deed is not to take effect and operate as a conveyance until my decease, and, in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me; and if she shall survive me, then, and in that event only, this deed shall be operative to convey to my said wife said premises in fee simple. Neither I, the grantor, nor the said Clarissa B. Abbott, the grantee, shall convey the above premises while we both live without our mutual consent. If I, the grantor, shall abandon or desert my said wife, then she shall have the sole use and income and control of said premises during her life.

"To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said Clarissa B., if she shall survive me, her heirs and assigns, to their use and behoof forever. And I do covenant with the said Clarissa B., her heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said Clarissa B. if she shall outlive me, to hold as aforesaid at my decease. And that I and my heirs shall and will warrant and defend the same to the said Clarissa B. if she shall survive me, and her heirs and assigns forever, against the lawful claims and demands of all persons.

"In witness whereof, I, the said James Abbott, have hereunto set my hand and seal, this thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-two.

JAMES ABCOTT. [Seal.]"

"Signed, sealed and delivered in presence of
N. M. WHITMORE,
L. CLAY."

Duly acknowledged and recorded.

BARROWS, J., delivered the opinion of the court:

The plaintiff's right to maintain this action must depend ultimately upon the construction to be given to the deed or instrument under which she claims title, and upon the force and effect of the terms used therein to define the interest which she acquired by virtue thereof. Our statutes (R. S., ch. 73, sec. 1), provide that "a person owning real estate and having a right of entry into it, whether seized of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." Detailed

regulations as to the mode of execution and as to the force and effect of conveyances thus made and recorded, follow this general provision in some thirty sections, more or less. Can it be doubted that under such statutes the owner of real estate can convey, in the manner prescribed, such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations? Why prevent the owner in fee simple from agreeing with his grantee (and setting forth that agreement in his conveyance) as to the time when, and the conditions upon which, the instrument shall be operative to transfer the estate from one to the other?

In substance our law now says to a party having such an interest in real estate as is mentioned in R. S., ch. 73, you may convey that interest, or any part thereof, in the manner herein prescribed, with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record so that all may see how the ownership stands.

In the discussion of the effect of the statute of uses and of our own statutes regulating conveyances of real estate in Wyman v. Brown, 50 Maine, 139 (a leading case upon the validity of conveyances under which the grantee's right of possession was to accrue, not upon delivery of the deed, but at some future day), Walton, J., remarks: "We are also of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses." In this connection he quotes Oliver's Conveyancing, touching the operation and properties of our common warranty deed to the effect that in the transfer authorized by the statute in this mode, "the land itself is conveyed as in a feoffment, except that livery of seizin is dispensed with upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it." And he concludes that deeds executed in accordance with the provisions of our statutes, and deriving their validity therefrom, may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day.

In other words, the mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seizin, and it is competent to fix such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate (of some sort) pass immediately to the grantee in opposition to the expressed intention of the parties. The feoffment is to be regarded as taking place, and the livery of seizin as occurring at the time fixed in the instrument, and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony. The questions, did anything pass by the conveyance, if so, what, and when, are to be determined by a fair construction of the language used, without reference to obsolete technicalities. The instrument will be upheld according to its terms, if those terms are definite and intelligible, and not in contravention of the requirements of sound public policy.

The defendant, while he does not controvert the doctrine of Wyman v. Brown, insists that nothing passed by the deed of James Abbott to his wife, because, according to its terms, it was left uncertain whether the instrument would ever take effect as a conveyance; that not even a contingent remainder, which the plaintiff claims, passed when the deed was made and delivered; that it amounts, at most, to a mere executory agreement, and any recognition of its validity is contrary to public policy, because it is an attempt to evade the statutes regulating the making and execution of wills. But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded so that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory, revocable. Whatever passed to the wife by this instrument became irrevocably hers.

We fail to perceive that any principle of public policy, or anything in the statute of wills, calls upon us to restrict the power of the owner of property unincumbered by debt, to make gifts of the same, and to qualify those gifts as he pleases, so far as the nature and extent of them are concerned. Public policy in this country has been supposed rather to favor the facilitation of transfers of title, and the alienation of estates, and the exercise of the most ample power over property by its owner that is consistent with good faith and fair dealing. The selfish principle may fairly be supposed to be, in all but exceptional cases, strong enough to prevent too lavish a distribution of a man's property by way of gift.

The learned counsel for defendant speaks of this instrument as "an attempt to make an executory devise," "a mode of devising real estate." It is something more and different, and if the doctrine of Wyman v. Brown is to be maintained, it gives to the grantee a contingent right in the property which (unlike the interest of a devisee in the lifetime of the testator) can not be taken from her, and may, upon the performance of the condition, make her the owner of the premises in

fee simple, according to its terms. It is argued that if the court give effect to this mode of transmitting a title to real estate, it will lead to uncertainty as to the rights of the respective parties, and to litigation between the heirs of the grantor and grantee; that "it would tie up estates, embarrass titles, and impair the simplicity of our modes of conveyance," without producing any compensatory benefit. Why these results should follow (when the validity and effect of such conveyances has once been determined) in any greater measure than they are liable to follow any kind of family settlement, is not apparent. What we do is precisely this. We uphold a conveyance in conformity with the agreement of the parties therein expressed, that the title of the grantee shall accrue, not upon the delivery of the deed, but upon the happening of a certain event (the proof of which is commonly easy) at a future time specified in the recorded conveyance. Why should harm come of it any more than from a lease made to run from a future day certain?

In substance, the grantor says to the grantee, I give you this conveyance, made and executed in the manner prescribed by our statute, so that you may have an irrevocable assurance that, if you outlive me, the property therein described shall be yours in fee simple, from and after my decease, in like manner as if you took the same by livery of seizin on that day, under a feoffment from me, the statute provisions for a recorded deed dispensing with that ceremony. Doubtless, this is all contrary to the ancient doctrine, which is thus stated in Greenleaf's Cruise, vol. 4, p. *48: "A feoffment can not be made to commence *in futuro*, so that if a person makes a feoffment to commence on a future day, and delivers seizin immediately, the livery is void, and nothing more than an estate at will passes to the feoffee." hat was the foundation of this doctrine? It is stated *ibidem* thus: "This doctrine is founded on two grounds: first, because the object and design of livery of seizin would fail if it were allowed to pass an estate which was to commence *in futuro;* as it would, in that case, be no evidence of the change of possession; secondly, the freehold would be in abeyance, which is never allowed when it can be avoided." But, given the system of recorded conveyances for which our statutes provide, the ceremony of livery of seizin becomes of no importance as an evidence of the change of possession; and we shall find our natural horror of a freehold in abeyance (if it could be demonstrated that such a result would follow from allowing a freehold to take effect *in futuro*) greatly mitigated by the circumstance that here and now it is no longer necessary "that the superior lord should know on whom to call for the military services due for the feud," and so, in any event, the defense of the commonwealth will not be weakened; and by the further circumstance that "every stranger who claims a right to any particular lands, may know against whom he ought to bring his præcipe for the recovery of them," by a simple inspection of the public records, and proof of actual possession.

The doctrine of Wyman v. Brown is a good illustration, both of the maxim *cessante ratione, cessat etiam lex*, and of the changes wrought in the common law by statutory provisions.

In Virginia, the doctrine that a feoffment can not be made to commence *in futuro* was long ago done away with by statute. Tate's Dig., p. 175. While it does not form part of the decision in Wyman v. Brown, this matter underwent a careful scrutiny, and, upon full consideration, the court agreed that our statute system of registered conveyances brought about the same result here.

We are at liberty, then, to give to the language used by the grantor in a deed its obvious meaning, without invalidating the deed, to say that it shall operate as the parties intended, and carry an estate to commence *in futuro* if they so agreed, without the necessity of resorting to any subterfuges under which the estate thus created to commence *in futuro* may be recognized as existing only by way of remainder, or by virtue of some imputed covenant to stand seized.

A single reading of this conveyance of James Abbott to his wife is sufficient to satisfy one that it was no part of the intention or expectation of either, that the wife acquired thereby any interest in the homestead farm during the life of the grantor except as expressly therein declared, to-wit, a right to the "use, income and control of said premises during her life," in case the husband deserted her (which he did not do), and, besides this, an irrevocable right to the same in fee simple, in case she survived her husband, her estate to commence at his decease.

The language of the deed differs widely from that of any of the conveyances which have been sustained as passing an estate in remainder to the grantee with a life-estate in the grantor reserved. If the object of the draftsman had been to exclude the idea that the conveyance should have any force until the time therein appointed, in other words, to have it take effect as a feoffment made at the time fixed *in futuro*, to convey, as of that date, an estate in fee simple and to have no other operation, it is difficult to see how he could have made that object plainer in words.

"This deed is not to take effect and operate as a conveyance until my decease, and, in case I shall survive my said wife, this deed is not to be operative as a conveyance * * * if she shall survive me, *then*, and in that event only, this deed shall be operative to convey to my said wife said premises in *fee simple*." Note also the language of the *habendum* and covenants. A conveyance thus framed can not give the rights of a remainder-man presently to the grantee, nor so operate forthwith, as a conveyance, as to convert the holding of the grantor from that time forward into a mere tenancy for life.

Such language bears little resemblance to the stipulation in the deed which was under consideration in Drown v. Smith, 52 Maine. 142, "but

the said (grantee) is not to have or take possession till after my decease; and I do reserve full power and control over said farm during my natural life."

It differs quite as much from the provision in the case of Wyman v. Brown, to the effect that Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease." Drown v. Smith, however, is an authority which relieves us on the question whether stipulations which on the face of them are not consistent with terms previously used importing a present conveyance, will avoid the deed. There is an apparent contradiction in saying, I convey this property to you, but this is no conveyance until, etc., nor unless, etc. But the modern cases like Drown v. Smith, indicate that if the intent, taking the whole together, is clear and intelligible, the court will give effect to it notwithstanding some apparent repugnancy. If a deed can be upheld where, as in Drown v. Smith, the grantor reserves to himself "full power and control over said farm during my (his) natural life," on the face of it including the power of disposition, we may give its fair and just effect to one framed, as this is, to convey an estate in fee simple to the grantee, *to commence* at the decease of the grantor, provided the grantee outlives him; and the true effect seems to be that of a feoffment under which the execution and record of the deed operate in the same manner as livery of seizin made at the time of the grantor's decease. It gives no right of action for waste committed during the grantor's life. While this grantor lived, he could do anything with the homestead farm not inconsistent with the right which he had conveyed to his wife to take it from the time of his decease, if she survived him, as the owner thenceforward in fee simple.

If the testimony of Lapham and Palmer represents truly the acts of which the plaintiff complains as waste, her suit, were it otherwise well-founded, would fail for want of proof of anything which amounts to waste according to the best-considered decisions in this country. See Drown v. Smith, *ubi supra*, and cases there cited.

Plaintiff nonsuit.

APPLETON, C. J., WALTON, DANFORTH, PETERS and SYMONDS, JJ., concurred.

PARENT AND CHILD— RELINQUISHMENT OF CUSTODY— REVOCATION — HABEAS CORPUS.

CHAPSKY v. WOOD.

Supreme Court of Kansas, November, 1881.

1. The parents are natural guardians, and *prima facie* entitled to the custody of their minor child, as well as chargeable with the obligation of its support.

2. A child is not in any sense like a horse or chattel, subject matter for absolute and irrevocable gift or contract.

3. A parent's right to the custody of a child is not like the right to property, an absolute and uncontrollable right. It will never be enforced where its enforcement will obviously destroy the happiness and well-being of the child.

4. While the mere gift of a child is revocable, yet, if reclamation is sought by proceedings in *habeas corpus*, the courts will consider the welfare of the child in determining whether to sustain the right and award possession to the parent. If reclamation be sought immediately after the gift, and the parent be not obviously an unfit person, by reason of immoralities, etc., the courts will, as a rule, consider the child's welfare as promoted by a return to its parent; and will pay little attention to prospective advantages of wealth, social position or otherwise, held out on the other side. But if, on the other hand, reclamation is not sought till after the lapse of many years, till the child has formed other ties, and different direction has been given to its course of life, then the court may properly give weight to the condition of the child's present surroundings, and all advantages which a continuance in those surroundings may reasonably be expected to give.

5. In such cases three rights or interests are to be regarded. First, that of the parent; second, that of those who have for years discharged all the obligations of parents; and third and chiefly, that of the child.

6. Upon the facts in this case the custody of the child is remanded to the respondents, and the petition is denied at the cost of the petitioner.

Original proceedings in *habeas corpus*.

Howell Jones, *J. D. McFarland*, *John Martin* and *J. D. S. Cook*, for petitioner; *Geo. R. Peck* and *L. C. Slavens*, for respondents.

BREWER, J., delivered the opinion of the court:

In this case of the petition of Morris A. Chapsky, for the possession of his minor child, counsel have in their arguments expressed very feelingly and truthfully the embarrassments and difficulties which surround the decision of a case like this. These arise, not because there is a conflicting question of fact to be settled by the court, for that is a matter of every day occurrence in judicial proceedings; it is not that it is a question between a grown man on one side and a grown woman on the other, for we could dispose of every question affecting simply them, without any embarrassment or hesitation. The burden of the case is that the decision is one which involves the future welfare of a little girl; and I think no man can look upon the face of a bright and happy little girl, like the one before us, and come to a decision of a question which may make or mar its future life, without hesitation and feeling; certainly we are not so insensible as to be able to do it.

The questions of law which are involved in a case like this, are few in number, and, I think, not subject to much doubt. They may be summed up briefly thus: The father is the natural guardian, and is *prima facie* entitled to the custody of his minor child. This right springs from two sources: One is, that he who brings a child, a helpless being, into life, ought to take care of that child until it is

able to take care of itself; and because of this obligation to take care of and support this helpless being, arises a reciprocal right to the custody and care of the offspring whom he must support; and the other reason is, that it is a law of nature that the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation.

The second proposition of law is, that a child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father can not, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. In this it differs from the gift of any article which is only property. If to-day Morris Chapsky should give a horse to another party, that gift is for all time irrevocable, and the property never can be reclaimed; but he can not, by simply giving away his child, relieve himself from the obligation to support that child, nor deprive himself of the right to its custody.

I might say here that the statute has provided for a relinquishment through probate court proceedings, which may be considered (but that is outside this case) irrevocable.

The third proposition is, that a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case and relieve us from all future difficulties. A mere right of property may be asserted by any man, no matter how bad, immoral or unworthy he may be; but no case can be found in which the courts have given to the father, who was a drunkard and a man of gross immoralities, the custody of a minor child, especially when that child is a girl. The fact that in such cases the courts have always refused the father the custody of his child, shows that he has not an absolute and uncontrollable right thereto.

The fourth proposition is, that though the gift of the child be revocable, yet when the gift has been once made, and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then, whether the courts will enforce the father's right to the custody of the child, will depend mainly upon the question whether such custody will promote the welfare and interest of such child. This distinction must be recognized. If, immediately after the gift, reclamation is sought, and the father is not what may be called an unfit person by reason of immorality, etc., the courts will pay little attention to any mere speculation as to the probability of benefit to the child by leaving or returning it. In other words, they will consider that the law of nature, which declares the strength of a father's love, is more to be considered than any mere speculation whatever as to the advantages which possible wealth and position might otherwise bestow; but, on the other hand, when reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact that ties of blood weaken, and ties of companionship strengthen by lapse of time, and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.

The fifth proposition is, that in questions of this kind, three interests should be considered: The right of the father must be considered; the right of the one who has filled the parental place for years should be considered. Perhaps it may not be technically correct to speak of that as a right; and yet, they who have for years filled the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy, when the burden is especially heavy — when the labor and care is of a kind whose value cannot be expressed in money — when all these labors have been performed, and the child has bloomed into a bright and happy girlhood, it is but fair and proper that their previous faithfulness, and the interest and affection which these labors have created in them, should be respected. Above all things, the paramount consideration is, What will promote the welfare of the child? These, I think, are about all the rules of law applicable to a case of this kind.

Now, passing to the facts, which I shall only outline: Morris A. Chapsky married the mother of this child ten years ago. The marriage was not acceptable to his parents, though for no reason that we are of advised, involving the character of any of the parties. Returning home immediately after his marriage, the father, commenting upon the fact of the marriage—which had been made without his consent—was not satisfied, and bade him start out for himself. Some criticism had been placed upon this conduct which, we think, is not deserved. It is often best for a young man that he should be turned out upon his own resources and compelled to struggle for himself; and that his father was not destitute of affection for his child is patent, from the fact that he made him a gift of money largely in excess of that which most young men have to start with. Whether his judgment was good, or otherwise, cuts no figure in this case. He started out with this money and wandered around, as a young man is apt to do, and drifting from place to place, finally came penniless to Kansas City. He struggled for a series of years under pecuniary embarrassment, and during these years this child was born; his wife's health was delicate, and she was obviously unable to discharge ordinary household duties, even without the care of this child; and the respondent, Mrs. Wood, her sister, kindly provided for her during her confinement, and took care of the child. The child was left with her, Mrs. Wood, and from that day to this, a period of

about five and one-half years, has been all the time in her custody. During the very early infancy of the child, the question arose as to its custody, Mrs. Wood insisting that the mother should take the child, or that it should be given to her. It is clear that this matter of discussion between the parties lasted for some time, and we are satisfied from the testimony that in fact a gift was made of the child by both mother and father to Mrs. Wood. The mother's letters exhibit this; and while the father does not recollect of having made such gift, we are convinced that he did so, and by parol agreement relinquished to the respondents his parental rights. No writing passed between them; but regarding as we do that a gift is not decisive in the case, unless made in accordance with the statutory form, the want of a writing cuts no figure now. The child was given to Mrs. Wood, and has been in her care for five years and a half, from the date of its birth to the present day. What the future of the child will be is a question of probability. No one is wise enough to forecast or determine absolutely what or what would not be best for it; yet we have to act upon these probabilities from the testimony before us, guided by the ordinary laws of human experience. Involved in the question as to what will promote the welfare of the child, are questions of wealth, questions of social position, questions of health, questions of educational advantages, moral training—of all things, in short, which will tend to develop a little girl into a perfect woman.

And first, we remark that the child has had, and enjoys to-day, good advantages, and its welfare has been promoted, and is promoted to-day. No one has said that this child has lacked anything which a child should have, and the testimony all shows that it has been cared for most patiently and faithfully; as well as it could have been cared for by any one; and to that care the face and appearance of the child abundantly testify. This fact does not rest on probabilities. It is a serious question always to be considered whether a change should be advised. "Let well enough alone," is an axiom founded on abundant experience. There is nothing in the present situation of the respondents, their pecuniary condition, the business capacity of the husband, their social position, their affection for this child—absolutely nothing which tends in any way to suggest that the welfare of the child, which has been promoted in the past, would be limited or abridged in the future. What they have done for the child tends to show what they will do through the future years of its girlhood; what that has been is certainly as much, and, I think, more than the average child receives.

Again, while there is more wealth on the side of the father, and pecuniary advantages are held out for her future, greater than those, perhaps, which the respondents can present; yet we can not be insensible to the surroundings under which the child would be placed if committed to its father. The grandfather has been on the stand before us, and, not merely from the testimony adduced from his relatives and neighbors, but from his appearance and manner on the stand, evidently he is a gentleman of character and responsibility, not destitute of affection, and one who has provided a comfortable home and is in a position to give to the child all these advantages. Yet the child, if it goes, goes to the care of its father, and while there is no testimony showing that the father is what might be called an unfit person; that his life had not been a moral one; yet we can but think that it is developed both by testimony and his manner and appearance on the stand, that there is a coldness, a lack of energy, and a shiftlessness of disposition which would not make his personal guardianship of the child the most likely to ripen and develop her character fully. He seems to us like a man still and cold, and a warm-hearted child would shrink and wither under care of such a nature, rather than ripen and develop. These are facts that we can but notice, and they have in them no imputation against the father, of an unkind nature or immoral life; but the facts, as they impress us, are, that the child would not really grow to its fullest promise under the care of such a man.

Again, and lastly, the child has had, and has to-day, all that a mother's love and care can give. The affection which a mother may have and does have springing from the fact that a child is her offspring, is an afffection which, perhaps, no other one can really possess; but so far as it is possible, springing from years of patient care of a little helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent, that so far as a mother's love can be equalled, its foster-mother has that love, and will continue to have it.

On the other hand, if she goes to the house of her father's family, the female inmates are an aunt just ripening into womanhood, and a grandmother. They have never seen the child; they have no affection for it springing from years of companionship. While she is a child of perhaps a favorite son or brother, she is also the child of a disowned or repudiated daughter-in-law and sister-in-law, and the appeal which the child will make naturally—and the child is one to make a strong appeal to any one—will always be shadowed and clouded by the fact that she comes from one who was not a favorite in that family.

Human impulses are such that doubtless they would form an affection for the child. It is hardly possible to believe otherwise; but to that deep, strong, patient love which springs from either motherhood, or from a patient care during years of helpless babyhood, they will be strangers.

They can not have this, and to my mind, I am frank to say, this last is the controlling consideration; and these three considerations are those

which compel us to say that we can not believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child; and if we should see a child of ours in the same circumstances, we can not believe that we should deem it wise or prudent to advise a change, notwithstanding the pecuniary advantages that might seem to be offered to it.

The judgment of the court, therefore is, that the child will be remanded to the respondents, and the petition is dismissed at the cost of the petitioner.

All the justices concurring.

CONTRACT—DIES NON — CHURCH SUBSCRIPTION.

DALE v. KNAPP.

Supreme Court of Pennsylvania, October, 1881.

A subscription made on Sunday towards the erection of a church edifice is not void.

Error to the Court of Common Pleas of Clearfield County.

MERCUR, J., delivered the opinion of the court:

This contention is whether a subscription made on Sunday towards the erection of a church edifice is void.

A contract made on Sunday is not void at common law. Kepner v. Keefer, 6 Watts, 231; Fox v. Mensch, 3 W. & S. 446; Shuman v. Shuman, 3 Casey, 90. If, then, this contract is void, it is by reason of the act of April 22, 1794. That act declares: "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted," and such other exceptions as are mentioned in the proviso, every person so offending shall be subject to the penalty as in the act prescribed.

It may be conceded that the making of this subscription is not a work necessarily done on Sunday. The question then is, whether the raising of money to build a house of worship is a work of charity, within the meaning of the act, or is the solicitation of contributions for that purpose from a congregation assembled on Sunday for religious worship, a work of charity?

No man can legally be compelled to contribute towards the erection of a house for public worship, nor to attend or support religious services therein. The statute imposes no such obligation. It, however, does recognize Sunday as the proper day for public worship. It leaves every one free to use the day for that purpose or refrain from such use. It is designed to compel a cessation of all those employments which will interfere with or interrupt the exercise of religious services, either public or private, on that day. The right to so worship is protected by its penal enactments. Each person has an indefeasible right to worship Almighty God according to the dictates of his own conscience. Each is at liberty to use Sunday for the purpose contemplated by the statute. If he refrains therefrom, he shall not so use the day as to annoy others who may be engaged in religious worship. Johnson v. Commonwealth, 10 Harris, 102. The purpose of the law is to protect the day for the comfort of those conducting or attending religious worship. Charity is active goodness. The means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion are not forbidden, and may be deemed works of charity, within the meaning of the statute. It is not essential that they be purely charitable. It is sufficient if they so far partake of that character as to be recognized by the congregation as a part of its active goodness, and are not expressly forbidden by the statute. Commonwealth v. Nesbit, 10 Casey, 398.

The inclination of this court has long been not to permit a person to set up this law against another person from whom he has received a meritorious consideration or on whom he has inflicted an injury. It was therefore said, in Mohney v. Cook, 2 Casey, 342, that the law relating to the observance of the Sabbath defines a duty of the citizen to the State, and to the State only. It was there held, that one who had erected an obstruction in a navigable stream, whereby the boat and cargo of another were wrecked on Sunday, could not, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in navigating his boat on that day. So it was held the hiring of a carriage on Sunday by a son to visit his father created a legal contract, although no reason was shown for visiting him on that day, other than flows from a general filial duty and affection. Long v. Mathews, 6 Barr, 417. It is not a violation of the act for a hired domestic servant to drive his employer's family to church on Sunday in the employer's private carriage. Commonwealth v. Nesbit, *supra*. A will executed on Sunday is not void, although at the time the testator be in his usual state of good health, and live five or six months thereafter. Beitman's Appeal, 5 P. F. S. 183.

Contracts for services on Sunday of the preacher, the sexton, the organist and the singers, are not illegal, although these persons may engage in such employment as a means of livelihood. Their services are in furtherance of the same great charity.

The custom of soliciting contributions on Sunday from congregations assembled for religious worship is very general, and has existed from an early period of time. With some denominations it may be for a greater variety of objects than with others. Sabbath offerings may be for the incidental expenses of the church; to light and warm the house, to pay the organist and the sexton, to assist the poor, to repair, enlarge and rebuild the church edifice, to

support foreign and domestic missions. The latter often extends to furnishing aid to poorer congregations towards erecting houses of worship. If it be illegal to give or agree to give for such objects on Sunday, it must be illegal to solicit the giving. We are not aware it has ever been held that the preacher became liable to the penal provisions of the statute by soliciting from the pulpit such contributions, nor any of the officers of the church for taking up the collection. Whether the sum be large or small does not change the principle applicable to the transaction. It is true there is a legal distinction between having given and agreeing to give; yet, inasmuch as we think a subscription towards the erection of a house of public worship is a work of charity, such agreement is not prohibited by the Act of 22d of April, 1794. The conclusion at which we have arrived is not in accord with the doctrine assumed in Catlett v. Trustees, 62 Ind. 365, but in principle it is in harmony with the rule declared in Flagg v. Millbury, 4 Cush. 243; Bennett v. Brooks, 9 Allen, 118; Doyle v. Lynn, 118 Mass. 195; and directly sustained in Allen v. Duffy, decided last year by the Supreme Court of Michigan, and reported in the 9th volume of the Reporter, 646.

The support of religious societies is a charity. It is a giving for the love of God, or the love of a neighbor in a broad Catholic sense. Whatever is morally fit and proper to be done on Sunday in furtherance of the great object, is likewise a charity. The learned judge therefore erred in ordering a nonsuit and in refusing to take it off.

Judgment reversed, and a *procedendo* awarded.

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

62. A negro man and woman, A and B, being slaves, were, by consent of their masters, and according to the custom then prevailing among that race, married, and lived together until separated by the will of their masters. From this marriage two children were born. After emancipation A married C and died intestate, leaving no children by C. Can the children by first marriage claim an interest in A's estate as against C, the law in Mississippi being that, on the death of a husband without legitimate children, his wife inherits all his estate? The question is simply, Are the children of A and B bastards?

Coffeeville, Miss. R. R.

63. A buys personal property of B for $200, paying $100 in cash, and giving a sixty-day note for the amount of the balance. Delivery is made to him at the time of sale. He then gives a chattel mortgage on the goods to C, which is duly filed in the town where A has the property in possession. A borrows heavily, and then runs away. The mortgagee takes possession by virtue of the power given him in the mortgage, and creditors get out attachments against the property, and levy is made. The mortgagee and constable who makes the levy leave the property with D. B then brings an action of replevin, and makes D the defendant, giving a bond to him only. Can B recover the whole, or any part of the property, on a plea that the sale was conditional—title to remain in him until fully paid for? How much credit should be given to the plea of a conditional sale under such circumstances? Would an innocent purchaser be protected against the claim of B? Give authorities.

Peekskill, N. Y. E. B. T.

64. A conveyed by warranty deed a tract of land to G, and received all the purchase money for the same with the exception of $300, for which $300 A took no security. Afterwards R obtained a judgment against G. After R's judgment was rendered, B obtains a judgment against G. After B's judgment was rendered, A brought an action against G, to enforce a vendor's lien, making R a party defendant, and obtained a decree declaring A's lien prior to that of R's. B was not made a party to A's suit. Execution issued on R's judgment, and the land sold for a sufficient sum to satisfy A and R's judgments. What are the rights of A, B and R to the money made by said sale under the laws of Indiana? Please cite authorities. J. D.

Fredricksburg, Ind.

65. X files an addition under the Missouri Plat Act, nine lots in a row, each 100 feet wide on paper, and numbered from 1 to 9. The only corners indicated by stakes are the four corners of the addition. The land is short, there being only 850 feet of frontage. X conveys seven lots (1-7) by number and reference to his filed plat, and tells the vendees to take possession. Each vendee takes 100 feet, measuring from the side of his lot next to lot 1, and makes valuable unremovable improvements. So far nobody knows of the 50 feet shortage. X now executes and delivers simultaneously, for cash, exactly similar deeds, to A for lot 8 and to B for lot 9, referring to filed plat, and tells A and B to take possession. A and B proceed to the ground together, and make the first discovery of the shortage. X is insolvent. Now what is the law as to the relative rights of A and B, and of all the nine vendees? F. H. S.

Springfield, Mo.

66. A and B, husband and wife, enter into a written agreement to live separate. The husband agrees to, and does pay the wife $150, and relinquishes all marital rights of property and person; again, that the wife may acquire property, carry on business and do as she pleases generally. The wife, in consideration of the $150, and the other immunities named, relinquishes all claims on the husband for support, and relinquishes all claim for dower in the real estate he then owns or may hereafter acquire. The wife has no property of her own. The $150 is not expressed to be a jointure, and in this case is hardly an equitable division, though the husband's means are limited. The agreement was not made with a view of allowing the wife to engage in business for herself, but to settle present difficulties, the parties having lived unhappily. Both parties sign and acknowledge the agreement; the wife being examined separately by a notary pub-

lic, and relinquished her dower generally in all he husband's real estate. The instrument is duly recorded. Query. Does a purchaser of the husband's real estate take it discharged of the wife's inchoate right of dower? Both parties are living. H.

Brunswick, Mo.

QUERIES ANSWERED.

Query 58. [13 Cent. L. J. 595.] A, B and C own as tenants in common a town lot. They contract with D to build a house thereon. They sign the contract as parties of the second part, and covenant "each for himself, and not for the others, binds himself to pay a proportionate part of the contract price, as his interest in the lot bears to the whole amount to be paid." Each has an equal interest in the lot. Now, under secs. 13 and 14 Colo. Code, corresponding with secs. 14 and 15, Parker's Cal. Code, and 36, 37, 38 and 39 of Kentucky Civil Code, and secs. 119 and 120 N. Y. Code, and sec. 38 Ohio Code, can D join as defendants in the same action as A, B and C when all the defendants have defaulted in payment under the contract? McD.

Gunnison, Col.

Answer. I do not answer under sections of State codes referred to, but I propose the following thoughts: When two or more persons, from any cause, are entitled to the possession, simultaneously, of any property in Georgia, a tenancy in common is created. Code, § 2301. Each tenant in common has the right to possess the joint property, barring infringements, in which event he is liable to account to his cotenant. Code, § 2302. They may sue separately. 28 Ga. 469. Either party may convey his undivided interest. 19 Ga. 13. Now the question is, where three parties are tenants in common, and in that capacity contract with a contractor to build a house thereon, and default in payment under the contract, must the contractor sue them jointly or separately? Each for himself agrees to pay such proportionate part as his interest in the lot bears to the whole amount to be paid. The lot, three own, and the house, it appears, would also be the joint property of the three. Would the contractor in his suit proceed against the lot, the house, or both jointly? A mechanic's lien filed and foreclosed legally would secure the house and probably the lot. But the papers would have to be drawn making the parties co-defendants, for the contractor did the work for the three, and the peculiar wording of the covenant simply refers to the source to which the tenant in common as an ultimatum would look as a means of payment. Their interest being joint, should be reached in one suit. Equity not alone avoids a multiplicity of suits. The only instance when tenants in common sue, or are sued, separately, is when each tenant acts independently of the other.

Savannah, Ga. E. D. W., Jr.

RECENT LEGAL LITERATURE.

CASES ON BILLS AND NOTES. A Selection of Cases on the Law of Bills and Notes and other Negotiable Paper, with full References and Citations, and also an Index and Summary of the Cases. Prepared for use as a text-book in Harvard Law School. By James Barr Ames, Bussey Professor of Law in Harvard University. In two volumes. Boston, 1881: Soule & Bugbee.

We approach the criticism of these volumes with considerable hesitation, because we wish, on the one hand, to do no injustice, and on the other, not to mislead. It is the intention, in this part of the JOURNAL, to give our readers a fair, though, of course, necessarily brief, and, perhaps, even perfunctory outline of the current legal publications. We desire, however, that it should be fully understood that our comments are written in the interest of our readers, and in the hope that what we have to say may assist them somewhat in making additions to their libraries. With this preface we are prepared to say that these volumes are evidently prepared with great care, skill and judgment. We have nowhere seen a more interesting, or, we believe, more thorough collection of cases upon the subject. The lack of a *syllabus*, however, to each case (an omission designed, we imagine, to assist in its office of text book by preventing desultory cramming on the part of students), renders the work almost useless to the practicing lawyer, whose time is of value. The presence, too, of three solid pages of *addenda et corrigenda* does not speak well for its mechanical execution. If so many errors were found, how many are there which have escaped attention? The binding deserves a word of special commendation. It is half calf and cloth, a handsome and far more durable dress than the law-sheep which is so much in vogue. This is an example worth following.

LINDLEY ON PARTNERSHIP. A Treatise on the Law of Partnership, including its Application to Companies. Fourth Edition. By the Hon. Sir Nathaniel Lindley, Knt., one of the Judges of Her Majesty's High Court of Justice, assisted by Samuel Dickinson, of Lincoln's Inn, Esq., Barrister-at-law. Edited and annotated by Marshall D. Ewell, LL.D. In two volumes. Chicago, 1881: Callaghan & Co.

The profession are to be congratulated upon the appearance of this standard English work upon an all-important and much-litigated topic, in a convenient and economical American dress. The framework of the law upon this subject is common to both countries; but there are many things in the English books, growing principally out of the peculiarities of English business methods, and the course of legislation in recent years. Much of such matter the American editor has omitted, where it could be done without injury to the symmetry of the work, including the chapter upon the English Bankruptcy Act and the latter part of the second volume on the winding up of companies under the English statutes, to which legislation there is no parallel in this country. What remains is directly applicable to our system, and has been much enriched by copious and exhaustive annotations with American citations. A work of equal excellence, written purely for the American bar, and inspired by the views taken in the American adjudications would, perhaps, be preferable. But there is no such work in existence. As it stands, these volumes form unquestionably the best treatise on the topic for the use of the American lawyer that is accessible. The mechanical execution of the work is

faultless, and is creditable alike to the enterprising firm by which it is published, and to the very complete establishment of the *Chicago Legal News Co.* in which it was printed.

KELLEY'S NEW TREATISE. A Treatise on the Law Relating to the Powers and Duties of Justices of the Peace, Constables, etc., etc., in the State of Missouri, with Practical Forms and Essays on various Titles of Law. Second edition, Revised and Enlarged so as to conform to the Revised Statutes of 1879. By Henry S. Kelley. St. Louis, Mo., 1881: The Gilbert Book Co.

The new edition of this most useful *vade mecum* of those interested in practice in magistrates' cases, which has attained a widespread popularity among the justices of the peace and younger members of the bar all over the State, was rendered necessary by the revision of the statutes of 1879. We predict for it a rapid and successful sale.

AMERICAN DECISIONS. The American Decision, containing the Cases of General Value and Authority Decided in the Courts of the Several States, from the Earliest Issue of the State Reports to the Year 1869. Compiled and Annotated by A. C. Freeman. Vol. 29. San Francisco, 1881: A. L. Bancroft & Co.

This volume brings this important series down to about 1836. Among its most striking features are notes On the Rights of an Alien to Hold Land, p. 232; Preferences to Creditors, p. 110; Injuries Occasioned by Accident, p. 149; Indorsement in Blank of a Promissory Note by a Person other than Payee or Holder, p. 297; The Allegation of Corporate Existence, p. 375; Indefinite Acknowledgments of Indebtedness, p. 467; Trespass by Co-Tenant against Another, p. 483; Over-Valuation of Insured Property, p. 616; Cruelty as a Ground for Divorce, p. 674; Testamentary Guardians, p. 712; Alienation of Different Parcels of Mortgaged Land, p. 747; and a long and very able discussion of the law of Stoppage *in Transitu*, p. 384. These notes are one of the most valuable features of this series, not unfrequently furnishing the reader with a complete and exhaustive review of the subject upon which he is seeking light.

AMERICAN REPORTS. The American Reports, containing all Decisions of General Interest decided in the Courts of Last Resort of the Several States, with Notes and References by Irving Browne. Vol. 36. Albany, 1881: John D. Parsons, Jr.

This volume in every respect maintains the high standard of its predecessors. Among the more interesting and valuable annotations will be found the following: Bigamous Marriages, p. 22; Sentencing for Murder, the Necessity of asking the Prisoner if he has anything to say in his Defense, p. 89; Agreement by Railroad Company to Maintain a Station nowhere else in a City than upon the Land granted Void, p. 214; Mental Anxiety as an Element of Damage, p. 303; Usury of National Banks, p. 360; Easements by Necessity, p. 415; Belief in Spiritualism as an Evidence of Unsound Mind on part of Testator, p. 426; Erection of Embankment, causing Overflow, by Riparian Owner, p. 490; Liability of National Bank for Special Deposit, p. 592.

AMERICAN PROBATE REPORTS. The American Probate Reports, containing Recent Cases of General Value decided in the Courts of the Several States on Points of Probate Law. With Notes and References. By Wm. W. Ladd, Jr. Vol. I. New York, 1881: Baker, Voorhis & Co.

We consider the issuance of this series of reports a step in the right direction. It is perfectly apparent to everybody that the volumes of the State reports have increased so enormously of late years, that it has long since ceased to be possible for a lawyer to own, or, in most instances, have access to a complete library; and even if this were not the case, the reports of other States than his own contain much that to the average lawyer is merely useless lumber. The existence of the two series of selected reports, the American Decisions (intended to cover the period from the organization of the courts down to 1870), and the American Reports (covering the period since the last-named date), into which are being collected all cases of general interest and real importance, is an indication of the appreciation of this fact. But there are in the various walks of the profession many specialists, to whom the wide ground covered by the series above mentioned contains many matters of but little moment; among which, on the other hand, is much that they find extremely valuable. To them it would be preferable to have reports including the insignificant and unimportant decisions relating to their specialty, to having only the decisions which are properly leading cases, covering the wide domain of the general practitioner. For such a specialist in probate law, this series is properly intended, and to such we predict it will, if ably and honestly conducted upon the standard of this first volume, become in time indispensable. The cases appear to be very carefully selected and are frequently annotated.

DRINKS, DRINKERS AND DRINKING; or the Law and History of Intoxicating Liquors. By R. Vashon Rogers, Jr., of Osgoode Hall, Barrister-at-law. Albany, 1881: Weed, Parsons & Co.

This is one of those charming little works, of which the author has already favored the profession with several, that serve to demonstrate the fact that the law may be made, in the right hands, amusing and attractive. In the pages of this booklet will be found traces of a deal of honest legal work, and a quantity of unique and interesting lore upon the subject of intoxicants which, together, render it most readable.

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